

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment pronounced on: January 06, 2014*

+ **CM(M) No.397/2012**

IMARTI DEVI & ORS Petitioners
Through Ms.Geetanjali Mohan, Adv. with
Ms.Mansi Gautam, Adv.

versus

PARAS RAM & ANR Respondents
Through Mr.Surinder Jain, Adv.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioners have challenged the order dated 6th February, 2012 passed by the learned Civil Judge (West) III, Delhi in Suit No.345/2011 whereby the application of the petitioners (legal representatives of the deceased defendant/Judgment-debtor Om Prakash) under Section 151 CPC was disposed of which was filed by the petitioners for disposal of the pending application under Sections 144 & 151 CPC which was not decided rather the matter was fixed for evidence.

2. The facts of the matter are that the respondents/plaintiffs filed a suit against the original defendant Om Prakash for possession in regard to a part of the premises bearing No.B-1/2, Sidharth Basti, Bhagwan Nagar, New Delhi. The respondents obtained an *ex parte* decree dated 25th November, 1995 against said Om Prakash and had also taken the possession of the said premises on 20th April, 1996. However, the said *ex parte* decree was set-

aside in an appeal filed by the petitioners by order dated 11th April, 2007. The respondents filed a Regular Second Appeal being RSA No.2001/2007 against the said order dated 11th April, 2007. The said appeal was dismissed by this Court by order dated 11th August, 2009. The said order passed by this Court was not challenged by the respondents and the same has become final between the parties.

3. In the meanwhile, the petitioners filed an application under Sections 144 & 151 CPC in the learned trial Court directing the respondents to restore the possession of the suit premises taken by them in pursuance of the *ex parte* decree which was later on set-aside by the Appellate Court. The contention of the petitioners is that after setting-aside of the decree, the respondents have no right to retain the possession of the suit premises with them and they are liable to restore the same to the petitioners.

4. Reply to this application was filed by the respondents who contended that after passing of the decree, the respondents had removed the intervening wall between the suit shop and the adjoining shop of respondent No.1. Therefore, when the suit shop is admittedly not in existence at all, how the possession of the non-existent suit premises can be restituted/restored to the petitioners.

5. The petitioners filed another application under Section 151 CPC for disposal of the application under Sections 144 & 151 CPC. However, no relief in the said application was allowed rather the application under Section 151 CPC was disposed of. By the impugned order, the main application under Sections 144 & 151 CPC was kept pending by the learned trial Court, on the reason that the learned trial Court felt that it would be appropriate to decide the main suit instead of application for restitution. It

was ordered that once the suit is disposed of on merits and all these things would depend upon the outcome of the same. The learned trial Court instead of deciding the application put up the matter for respondents/plaintiffs' evidence by the impugned order dated 6th February, 2012.

6. The impugned order has been challenged by the petitioners, mainly, on the reason that the application under Sections 144 & 151 CPC ought to have been decided and a prayer is made in the petition that the impugned order to this extent be set-aside and the learned trial Court be directed to dispose of the said application within the specific time period so that the petitioners may not be deprived of their rights in the suit premises, the possession of which was taken by the respondents on the basis of the *ex parte* decree which has been set-aside subsequently.

7. Certain decisions are referred as under:-

i) ***Kandan (died) and Others vs. K. Periaswamy***, AIR 2004 Madras 425.

Relevant para 9 reads as under:

“9. In the instant case, it is not in dispute that the very decree made in O.S. No.408 of 1978 was set aside in view of the restoration of the suit. In such case, the Court has got a duty to enforce its obligation to reconstitute the property to the applicant who was deprived of his possession based on the decree or order, inasmuch as it is a settled law that whenever an *ex parte* decree or orders is set aside, the party who was dispossessed or evicted in pursuance of such *ex parte* decree or order is entitled to restitution forthwith, in spite of the fact that, ultimately, on merits, he might lose the cause; and that whenever an *ex parte* decree or order is set aside, no person who has entered into possession through the party obtaining the *ex parte* decree or order, can resist or

obstruct restitution on the ground that he is a bona fide transferee.”

- ii) ***Mrs. Kavita Trehan & Anr. vs. Balsara Hygiene Products Ltd.***, 1995

(1) PLR 315. Relevant para 24 read as under:

“24. The jurisdiction to make restitution is inherent in every court and will be exercised whenever the justice of the case demands. It will be exercised under inherent powers where the case did not strictly fall within the ambit of Section 144. Section 144 opens with the words “Where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceedings or is set aside or modified in any suit instituted for the purpose...”. The instant case may not strictly fall within the terms of Section 144, but the aggrieved party in such a case can appeal to the larger and general powers of restitution inherent in every Court.”

- iii) ***Viswanath Bogar vs. Gyarasil Agarwalla***. 2006 (2) GLT 514.

Relevant para 9 read as under:

“9. We find that the provisions of Section 141 CPC as well as Section 144 CPC, are included in part 9 of the Civil Code, providing for the Misc provisions and we do not find any substance in the submission that Order 9 Rule 13 proceeding is excluded from the purview of Section 144 CPC and that when an ex-parte decree is set aside under Order 9 Rule 13 CPC, the benefit of Section 144 CPC is not available and the same is available only when the said ex-parte decree is set aside in a separate suit. If the above proposition is accepted, it will provide for multiplicity of proceeding, whereas the Civil Procedure Code is amended to grant relief expeditiously, avoiding multiplicity of proceedings.”

- iv) ***Pushpa Ahuja vs. Shri Sunil Nagpal & Ors.***, (2011) 163 PLR 117.

Relevant portions of paras 7 and 8 read as under:

“7. Hence, the first argument raised by learned counsel for the petitioner is totally misconceived in view of the decision of the Supreme Court in the case of Kavita Trehan (Supra) in which it has been held that the jurisdiction to make restitution is inherent in every Court and will be exercised whenever the justice of the case demands. It will be exercised under inherent powers even where the case do not strictly fall within the ambit of Section 144 of the CPC. In the case of Shri Subash Chander (Supra) and Shri Jaswant Kaur (Supra), it has been held that the Rent Controller has jurisdiction to restore possession to tenant in exercise of powers under Section 144 of CPC. Similar view has been expressed in the case of Maya Ram (Supra) in which it is held that if the Executing Court also happens to be an authority under the Rent Act, it will not affect its jurisdiction and it can ultimately pass the order of restitution under Section 144 of the CPC or even ex-debito justitiae. The second argument raised by learned counsel for the petitioner is that having lost in the ejectment petition filed by the landlord earlier, the tenants would at the most get the possession but not status of tenant and are thus, liable to pay the mesne profit. To my mind, this argument is totally misplaced because the relationship of landlord and tenant have never come to an end as in the earlier petitions the ejectment order has not been converted into final order and as such the relationship is continuous and is subsisting. The last and final argument is that soon after the ejectment of the tenants the landlord has inducted another tenant, therefore, third party right has crept in and possession cannot be ordered to be delivered. This argument of the learned counsel for the petitioner is contrary to the decision of the Supreme Court in the case of Gurjoginder Singh (Supra) in which it has been held that “we are unable to share the view expressed by the High Court as in our considered opinion, the status of a bona fide purchaser in an auction sale in execution of a decree to which he was not a party stands on a distinct and different footing from that of a person who is inducted as a tenant by a decree holder – landlord. A stranger auction purchaser does not derive his title from either the decree-holder or the judgment-debtor and

therefore restitution may not be granted against him but a tenant who obtains possession from the decree-holder landlord cannot avail of the same right as his possession as a tenant is derived from the landlord”.

8. Similarly, in the case of Basant Ram and others (Supra), it was held by this Court that once a person is held entitled to restitution of possession of property in dispute, he will have the right to get back such property in the same condition as it was already in the possession of the other person and improvement in the property will have no affect as it would not defeat the rights of the respondent merely on the ground that the property has been sold. It was held that the purchaser will be bound by the order passed against the original landlord.”

8. After having considered the settled law on this aspect as well as the submissions of the parties, I am of the view that there is a force in the submissions of the petitioners. Thus, the impugned order dated 6th February, 2012 is set-aside to the extent that the outcome of the application under Sections 144 & 151 CPC would be decided once the suit is disposed of. The learned trial Court is directed to dispose of the pending application under Sections 144 & 151 CPC filed by the petitioners, within one month from today.

9. With these directions, the present petition is disposed of.

(MANMOHAN SINGH)
JUDGE

JANUARY 06, 2014